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United States Supreme Court Review of Tenth Circuit Decisions

Eric Twelker

UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

I. *ASPEN SKIING CO. V. ASPEN HIGHLANDS SKIING CORP.*: THE SUPREME COURT UPHELD AN ANTITRUST DECISION AGAINST A MARKET-DOMINANT COMPANY WHICH REFUSED TO COOPERATE WITH A COMPETITOR

A. *Introduction*

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,[1] brings together fierce competition, the Colorado ski industry, and the volatile field of antitrust law. Currently in an uncertain state as a result of strong international competition and governmental efforts to lessen the burden of regulation,[2] American antitrust law has had a long and tumultuous history, beginning with deliberate policies of economic regulation formed in the late nineteenth century.[3] Although possession of monopoly power by itself will not generally constitute a violation of the Sherman Act's prohibitions against restraint of trade,[4] it is unclear to what extent certain activities or purposes will, when performed by a business possessing

1. 105 S. Ct. 2847 (1985), *aff'g* 738 F.2d 1509 (10th Cir. 1984).

2. The Reagan administration announced in February of 1986 that it would attempt to ease some of the burden antitrust laws place on businesses, such as the provision that treble damages can be awarded to the prevailing party in an antitrust action. This could be accomplished by influencing Congress to pass legislation changing antitrust laws. Middleton, *New Antitrust Era Takes Shape*, The National Law Journal, January 13, 1986, at 1.

3. Rapidly expanding railroads were accused of rate discrimination, illegal kickbacks, and other unfair practices. *Hearings on Proposed Amendments to the Interstate Commerce Act, Hearing on S. 1629*, 74th Cong., 1st Sess. 47 (1935). The nation's first antitrust statute, the Sherman Act, was passed in 1890 in response to these accusations. 15 U.S.C. §§ 1-7 (1982). The history and intricacies of antitrust law have captured the interest of many scholars. For comprehensive analyses of antitrust law and its history, see H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955); P. AREEDA & D. TURNER, ANTITRUST LAW (1978). An emerging position claims that all antitrust laws in general have been harmful to this country. For example, see D. T. ARMENTENO, ANTITRUST POLICY: THE CASE FOR REPEAL (1986).

4. Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1 (1982). Section 2 states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor.

15 U.S.C. § 2 (1982). *See* United States v. Griffith, 334 U.S. 100 (1948); Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). *But see* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (in which general intent to maintain a market position which was a monopoly, rather than specific intent to harm competitors, was found to be the basis for a section 2 violation, suggesting that mere monopoly power could constitute such a violation); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) (where it was implied that, had the applicable market been more narrowly defined, duPont's 75% market share of that narrower market alone could have provided the basis for a section 2 violation).

monopoly power in a defined market, combine to become a violation of the Act.[5] *Aspen Skiing Co.*, the first monopolization case since 1973,[6] discussed and further defined one area of business conduct which may, in combination with monopoly power, violate section 2 of the Sherman Act: the refusal to deal with competitors. Affirming both the Tenth Circuit and the Federal District Court, a unanimous Supreme Court found the conduct of Aspen Skiing Company, in concert with its partial monopoly of the Aspen skiing market, to be in violation of section 2 of the Act.[7]

B. *Facts*

Aspen, Colorado boasts four superb facilities for downhill skiing. Aspen Highlands, Aspen Mountain (Ajax), and Buttermilk were developed into ski resorts by private developers between 1945 and 1960. Aspen Skiing Company (Aspen) purchased Ajax and Buttermilk, then developed a fourth ski area, Snowmass, which opened in 1967. Aspen Highlands is still owned and operated by an independent company, Aspen Highlands Corporation (Highlands).

From 1962 until 1978, with one exception, joint passes were sold which allowed a skier to ski any of the four mountains during a limited time period. For all but the 1977-1978 season, revenues from the sale of these "all-Aspen" tickets were divided among the four ski areas based on usage of each area.[8] Various methods were used to determine how many skiers with the "all-Aspen" ticket used each mountain.

For the 1977-1978 season, Aspen offered to continue the "all-

5. Developmental cases involving section 2 violations include: United States v. Griffith, 334 U.S. 100 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The reasoning of these cases culminated in a monopolization test introduced in United States v. Grinnell Corp., 384 U.S. 563 (1966), which has remained the standard for over twenty years.

6. Travers, *Does a Monopolist Have a Duty to Deal with its Rivals? Some Thoughts on the Aspen Skiing Case*, 57 U. COLO. L. REV. 727 (1986); Note, *The Monopolist's Duty to Cooperate in Joint Marketing Ventures with Competitors: The Quandry of* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 32 WAYNE L. REV. 1243, 1256 (1986) (hereafter cited as "*The Monopolist's Duty*") (*Aspen Skiing* is the first Supreme Court section 2 monopolization case since Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)).

7. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 105 S. Ct. 2847 (1985). For other commentaries and discussions of the subject case, see Malina, *Supreme Court Update*, 54 ANTITRUST L.J. 280, 289-90 (1985) ("possibly the most significant decision of the October 1984 Term"); *The Monopolist's Duty*, *supra* note 6; Travers, *supra* note 6; *Leading Cases*, 99 HARV. L. REV. 120, 275-83 (1985). For a thorough analysis of monopolies, including a review of the subject case, see Cirace, *An Economic Analysis of Antitrust Law's Natural Monopoly Cases*, 88 W. VA. L. REV. 677 (1986).

8. Various methods were used to determine the usage of each ski area. For the 1971-72 season, an all-Aspen ticket was monitored by lift operators recording the ticket numbers of persons using the slopes of Highlands. For the 1973-74 season, a random-sample survey was commissioned to determine how many skiers with the four-area ski ticket used each mountain. The ski areas allocated revenues from the ticket sales based on the survey's results. Highland's share of those revenues was 17.5% in 1973-74; 18.5% in 1974-75; 16.8% in 1975-76 and; 13.2% in 1976-77. Highlands' measured share of the total market was 15.8% in 1973-74; 17.1% in 1974-75; 17.4% in 1975-76 and; 20.5% in 1976-77. *Aspen Skiing Co.*, 105 S. Ct. at 2851.

Aspen" ticket only if Highlands would accept a fixed share of the ticket revenues. Fearing that the alternative might be no joint ticket at all, and hoping to persuade Aspen to reinstate the division of revenues based on use of each facility, Highlands eventually accepted a fixed percentage of revenues for the 1977-1978 season.[9] That season, however, was the last for the "all-Aspen" ticket.

Aspen ended its cooperation with Highlands by eliminating the "all-Aspen" ticket.[10] The company began to market its own three-area ski package featuring only its own mountains. In addition, Aspen took other actions[11] which made it extremely difficult for Highlands to market its own multi-area package to replace the joint "all-Aspen" ski ticket.

Highlands' market share for downhill skiing services declined steadily after the "all-Aspen" ticket based on usage was abolished.[12] In 1979, Highlands brought suit in the Federal District Court of Colorado, alleging antitrust violations by Aspen of section 2 of the Sherman Act.

C. *The Federal District Court Decision*

In her instructions to the jury, District Judge Zita Weinshienk defined monopolization by use of the two-part test developed in *United States v. Grinnell Corp.*,[13] for determining section 2 violations of the Act.[14] The offense of monopolization consists of: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes."[15] The jury instructions further read:

> In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other hand.[16]

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9. Highlands accepted 15% of the revenues for the 1977-78 season. No survey was made during that ski season to determine actual usage of Highlands. *Id.* at 2852.

10. Aspen and Highlands were unable to reach an agreement for the 1978-79 ski season. Indeed, a member of Aspen's Board of Directors had advocated making Highlands "an offer that [it] could not accept." *Id.*

11. These actions included: 1) an advertising campaign strongly implying that Ajax, Buttermilk and Snowmass were the only ski mountains in the Aspen, Colorado area; 2) refusal to sell Highlands any lift tickets for Aspen's mountains, either at the tour operator's discount or at retail and; 3) refusal to accept vouchers from Highlands' newly developed "Adventure Pack," an alternative ski package consisting of a 3-day pass at Highlands and three vouchers, each equal to the price of a daily lift ticket at an Aspen mountain. The vouchers were guaranteed by funds on deposit in a local bank, and were redeemable by local merchants at full value. *Id.* at 2853.

12. Highlands' share of the market for downhill skiing services was 20.5% in 1976-77; 15.7% in 1977-78; 13.1% in 1978-79; 12.5% in 1979-80 and; 11% in 1980-81. *Id.*

13. 384 U.S. 563 (1966); *see also Leading Cases*, *supra* note 7, at 276; *The Monopolist's Duty*, *supra* note 6, at 1258; Travers, *supra* note 6, at 730 (discussing the *Grinnell* test and its background).

14. *Aspen Skiing Co.*, 105 S. Ct. at 2854.

15. *Id.* at 2855; *Grinnell*, 384 U.S. at 570-71.

16. *Aspen Skiing Co.*, 105 S. Ct. at 2854.

The Sherman Act provides for treble damages. The jury found Aspen in violation of section 2 of the Act and calculated Highlands' actual damages at $2.5 million. As sought in Highlands' complaint, treble damages of $7.5 million and attorney's fees were awarded.[17]

D. *The Tenth Circuit Opinion*

On appeal before the Tenth Circuit, Aspen argued that the effect of the District Court's decision was to hold that businesses have a duty to deal or cooperate with their competitors.[18] The Tenth Circuit examined this argument in some depth, admitting that defining those instances in which a monopolist has a duty to cooperate with its competitors is "one of the most 'unsettled and vexatious' issues in antitrust law."[19] The court, citing *Byars v. Bluff City News Co., Inc.*, recognized two lines of cases defining circumstances in which the duty to deal with competitors might be imposed by law:[20] cases involving essential facilities and cases demonstrating an intent to create or maintain a monopoly by refusing to deal with competitors.[21]

The essential facilities or "bottleneck" theory of antitrust law involves control of facilities essential to the operation of an industry within a market area.[22] For example, when railroad companies jointly owned a terminal facility that was the only feasible terminal in a city, the owners were required to make the facility available to non-proprietor railroads on non-discriminatory and reasonable terms.[23] In analyzing the facts of *Aspen Skiing Co.* under the bottleneck theory, the Tenth Circuit noted Aspen's ownership of three out of the four ski mountains in the defined area market; the difficulty and high cost of entry into the market by developing a new ski area; Aspen's lack of cooperation with Highlands on ticketing arrangements amounting to a denial of the use of the facility even though only partially monopolized; and evidence that joint marketing arrangements for ski tickets was both feasible and profitable.[24] The court concluded that the essential facilities analysis was applicable and established a duty to deal on the part of Aspen.[25]

The court then turned briefly to the second possible basis for such a duty: intent. It stated that "a 'business is free to deal with whomever it pleases so long as it has no purpose to create or maintain a monop-

17. *Id.*

18. *Aspen Highlands Skiing Corp.*, 738 F.2d at 1518-20.

19. *Id.* at 1519 (quoting Byars v. Bluff City News Co., Inc., 609 F.2d 843, 846 (6th Cir. 1980)).

20. *Id.*

21. The court, in concluding that both lines of reasoning applied to the case before them, noted other cases where a duty to deal was found based on both theories, or generally, without distinguishing between the two. *Id.* at 1520 n.13.

22. *Id.* at 1520.

23. *Id.* (citing United States v. Terminal R.R. Assoc., 224 U.S. 383 (1912)).

24. The court followed the four-part analysis of liability under the bottleneck theory promoted in MCI Communications v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983). *Aspen Highlands Skiing Corp.*, 738 F.2d at 1520.

25. *Aspen Highlands Skiing Corp.*, 738 F.2d at 1521.

oly.' "[26] The court here, however, held the evidence sufficient for a jury to find an intent to monopolize from Aspen's conduct. Factors listed as influential were Aspen's refusal to cooperate with Highlands on a joint ski ticket program, Aspen's refusal to honor Highlands' "Adventure Pack" vouchers despite bank guarantees; and Aspen's raising of lift ticket prices, thwarting any future modification of the "Adventure Pack" idea.[27] The trial court's decision was upheld, as were awards of triple damages[28] and attorney's fees.

E. *The Supreme Court Opinion*

Justice Stevens wrote the eight-justice unanimous opinion[29] for the Supreme Court, affirming the Tenth Circuit decision. The opinion covered the facts in depth, underscoring those actions taken by Aspen Skiing Company that adversely affected Highlands.

The issue, as defined by the Supreme Court, was whether the jury finding of a section 2 violation was erroneous as a matter of law because it was based on the premise that those with monopoly power have a duty to cooperate with their competitors.[30] The Court found that, in light of District Judge Weinshienk's instructions,[31] the jury verdict was *not* based on any assumption of a duty to deal.[32]

However, the Court held that the general right to refuse to deal with others is not unqualified.[33] The opinion then discussed *Lorain Journal v. United States*.[34] In *Lorain*, the only local newspaper disseminating news and advertising in a small Ohio town, refused to sell advertising to persons who patronized a competing radio station.[35] In holding that this conduct violated section 2 of the Sherman Act, the Supreme Court said that the Journal's right to select customers and refuse advertise-

26. *Id.* at 1519 (citing Byars v. Bluff City News Co., Inc., 609 F.2d 843, 855 (6th Cir. 1980) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919))).

27. *Id.* at 1521-22.

28. The court also discussed in some detail Aspen's arguments against the injury and damages findings, *id.* at 1523-27, but held that the evidence was sufficient for a jury finding of lost revenues, and that the damages were reasonably estimated, in fact well under the estimates given by two expert witnesses. *Id.* at 1527.

29. Justice White took no part in the consideration of this case.

30. *Aspen Skiing Co.*, 105 S. Ct. at 2849. The tension between the Sherman Act's major provisions becomes apparent in considering a general duty to cooperate with competitors. An interpretation of section 2 requiring cooperation, could in some instances lead to a violation of section 1's prohibition of combinations "in restraint of trade." *See supra* note 4. It is interesting to note that in 1975, just four years before the institution of this suit, the Attorney General of Colorado brought a federal antitrust suit against both Aspen and Highlands, challenging, among other things, the joint ticket offered by the two companies. The suit was settled by a consent decree which subjected the sale of the "all-Aspen" ticket to certain restrictions. The irony of the two actions emphasizes the complexity and flexibility of antitrust theories. *See Leading Cases*, *supra* note 7, at 280 n.43 (noting conflicts between the Sherman Act's section 1 proscriptions against competitor cooperation and the possible scope of the *Aspen Skiing Co.* decision in defining a duty to deal with competitors).

31. *Aspen Skiing Co.*, 105 S. Ct. at 2854-55.

32. *Id.* at 2856.

33. *Id.* at 2857.

34. 342 U.S. 143 (1951).

35. *Id.* at 153.

ments was a qualified one. "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."[36]

The Court emphasized that Aspen did not reject a new proposal by a competitor, but "elected to make an important change in a pattern of distribution that had originated in a competitive market."[37] Because the jury instructions allowed for a possibility of monopoly based on business superiority alone, the Court assumed that the jury, in following the instructions, found no valid business reasons for Aspen's refusal to deal with Highlands.[38] In reviewing the record for support of the the jury's conclusions, the Court looked beyond the effect on Highlands alone to the effect on consumers and the market. Factors the Court highlighted in its review were consumer preference for the four-mountain "all-Aspen" pass; the decline of Highland's market share despite their mitigatory measures; Aspen's willingness to forego sales from Highlands of Aspen's own tickets or of vouchers from Highland's "Adventure Packs" without a valid business justification; and Aspen's failure to convince the jury that the "all-Aspen" pass was a problem to administer.[39] The Court concluded that the record supported the jury's finding that Aspen's efforts were "a deliberate effort to discourage customers from doing business with its smaller rival,"[40] and affirmed the Tenth Circuit judgment.[41]

F. *Conclusion*

The Supreme Court, while affirming the Tenth Circuit decision, did not analyze the case based on the essential facilities or "bottleneck" theory of a duty to deal with competitors. This doctrine was crucial to the Tenth Circuit's opinion. However, without identifying a particular standard, the Court's analysis did utilize an intent theory,[42] emphasizing Aspen's justifications, or lack of valid justifications, for its actions in refusing to deal with Highlands on the "all-Aspen" ticket.[43] This focus on

36. *Aspen Skiing Co.*, 105 S. Ct. at 2857 (quoting *Lorain*, 342 U.S. at 155 (quoting United States v. Colgate & Co., 250 U.S. 300 (1919))).

37. *Id.* at 2858; *but see Leading Cases*, *supra* note 7, at 279; *The Monopolist's Duty*, *supra* note 6, at 1262 (suggesting that the scope of the *Aspen Skiing Co.* decision could extend to new ventures promoted by competitors).

38. *Aspen Skiing Co.*, 105 S. Ct. at 2858-59; *see* Malina, *supra* note 7 (If a refusal to deal changes "the character of the market," and is therefore illegal, it would be a "harsh rule indeed.").

39. *Aspen Skiing Co.*, 105 S. Ct. at 2859-61.

40. *Id.* at 2861.

41. *Id.*

42. *See* Travers, *supra* note 6, at 741; Malina, *supra* note 7.

43. See Malina, *supra* note 7 (absence of justification by Aspen is the key to the Court's unanimity); *The Monopolist's Duty*, *supra* note 6, at 1246-49 (justification for a monopolist's refusal to deal with competitors is the dividing line between the right to deal with whomever one wants and a violation of section 2). *But see* Travers, *supra* note 6, at 742 (The Court did not differentiate between Aspen's refusal to continue the "all-Aspen" ticket and its conduct in refusing to honor Highland's vouchers, refusal to sell Aspen tickets to Highlands, etc.).

intent alone may serve to further limit the use of the essential facilities theory,[44] or may simply be an indication that intent is the common nucleus of both tests, since valid business-based justifications may serve to absolve a monopolist of section 2 wrong-doing in either instance.[45] If intent to monopolize is to be the focal point of any analysis of a duty to deal with one's rivals, it is unlikely that such a duty would be applied in cases of new ventures offered to market monopolists[46] unless specific intent on the part of key actors could be proved. Without a history of conduct leading to a monopoly, such as found in *Aspen Skiing Co.*, and without a past cooperative record to show the disparity of profered justifications for a monopolist's actions, proof of intent to monopolize would be difficult. Therefore, the scope of the *Aspen Skiing Co.* decision may be limited to situations involving on-going business dealings.

II. *FDIC v. PHILADELPHIA GEAR CORP.*: THE SUPREME COURT HELD A STANDBY LETTER OF CREDIT IS NOT AN FDIC-INSURED DEPOSIT

A. *Introduction*

Banks are now failing at a faster rate than at any time since the "Great Depression."[47] Many banks are in jeopardy because of the twin onslaughts of the depressed agricultural and oil industries.[48] Failure of the infamous Penn Square Bank[49] led to litigation which culminated in this case.

Due to the importance of maintaining public confidence in the banking system at all times, Congress has created federal safeguards in order to protect depositors' earnings in the event of a bank failure. When the Comptroller of the Currency declares a federal bank insolvent, the Federal Deposit Insurance Corporation (FDIC) is appointed as the receiver.[50] Each depositor is insured by the FDIC for the amount of deposit up to the statutory limit, which is now $100,000.[51] In *FDIC v. Philadelphia Gear Corp.*,[52] the issue was whether a standby letter of credit backed by a contingent promissory note is a "deposit" which would be

44. *See Leading Cases, supra* note 7, at 283 (essential facilities doctrine limited to situations where more than one competitor controls the facility).

45. *But see* Travers, *supra* note 6 ("intent" adds nothing to conduct).

46. *See supra* note 38.

47. *See Wall Street Journal*, Nov. 25, 1986, p.31.

48. *Id.*

49. When the Penn Square Bank was declared insolvent on July 5, 1982, the FDIC, for only the third time in its history, had to create a special bank in order to refund deposits. Investors of the insolvent bank immediately moved to block redemption of letters of credit. Legal Times Washington, July 12, 1828, at 1, col. 2. *See generally*, Note, *The Aftermath of Penn Square Bank: Protecting Loan Participants from Setoffs*, 18 TULSA L.J. 261 (1982). The Penn Square probe eventually became a criminal investigation. L.A. Daily J., Sept. 29, 1982, at 5, col. 5.

50. 12 U.S.C. § 1821 (Supp. IV 1980). The FDIC was established by the Banking Act of 1933. Pub. L. No. 73-66, 48 Stat. 162, 168. These provisions were revised in 1950 and are currently codified in 12 U.S.C. §§ 1811-32 (1982).

51. 12 U.S.C. § 1821(a)(1) (1982) sets forth $100,000 as the maximum amount generally insured by the FDIC for any single depositor at a given bank.

52. 106 S. Ct. 1931 (1986).

insured by the FDIC.[53] The U.S. District Court [54] and the Tenth Circuit [55] both held that such a note is an FDIC-insured deposit. The United States Supreme Court reversed.

B. *Facts*

Orion Manufacturing Corporation (Orion) produced pumping equipment for use in the oil fields of Oklahoma and Texas. Philadelphia Gear is a trade supplier which furnished major parts for Orion's equipment. Penn Square Bank was a federal bank in Oklahoma City, Oklahoma.

Orion had requested Penn Square Bank to issue an irrevocable standby letter of credit for $145,200 for the benefit of Philadelphia Gear. The purpose of this letter of credit was to allow Philadelphia Gear easy and reliable access to any money owed to it by Orion. As security for the letter of credit, Orion agreed to execute an unsecured promissory note in favor of Penn Square Bank for the same amount. Both the letter of credit and the note were executed on April 23, 1981.[56]

The letter of credit was contingent upon certain events. Philadelphia Gear was required to present a "signed statement that [it had] invoiced Orion Manufacturing Corporation and that said invoices have remained unpaid for at least fifteen (15) days"[57] in order to receive payment from Penn Square. The bank would then pay Philadelphia Gear, and charge interest to Orion Manufacturing Corporation for the amount borrowed.[58]

Penn Square was declared insolvent on July 5, 1982.[59] The FDIC, as receiver and liquidator of the bank, received drafts from Philadelphia Gear on the letter of credit in excess of $700,000.[60] The FDIC disaf-

53. The volume of material concerning letters of credit is large and growing. *See generally* B. CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS 8-1 to -80 (rev. ed. 1981); J. DOLAN, THE LAW OF LETTERS OF CREDIT (1984); H. HARFIELD, LETTERS OF CREDIT (1979); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAWS UNDER THE UNIFORM COMMERCIAL CODE 104-53 (2d ed. 1980). Pertinent law review articles on the subject of standby letters of credit include Arnold & Bransilver, *The Standby Letter of Credit - The Controversy Continues*, 10 U.C.C. L.J. 272 (1978); Garma, *Standby Letters of Credit and Guarantees: Do We Understand What We're Doing*, 1978 J. COM. BANK LENDING 3 (1978); Harfield, *The Standby Letter of Credit Debate*, 94 BANKING L.J. 293 (1977); Katskee, *The Standby Letter of Credit Debate - The Case for Congressional Resolution*, 92 BANKING L.J. 697 (1975); Comment, *The Standby Letter of Credit: What It Is and How to Use It*, 45 MONTANA L. REV. 71 (1984). For a thoughtful treatment of the history and proper interpretation of whether standby letters of credit should be treated as federally insured deposits, see Note, *Standby Letters of Credit: Are They Insured Deposits?*, 32 WAYNE L. REV. 1165 (1986) (concluding that standby letters were never intended to be federally insured).

54. Philadelphia Gear Corp. v. FDIC, 587 F. Supp. 294 (W.D. Okla. 1984), *aff'd in part, rev'd in part*, 751 F.2d 1131 (10th Cir. 1984), *rev'd*, 106 S. Ct. 1931 (1986).

55. Philadelphia Gear Corp. v. FDIC, 751 F.2d 1131 (10th Cir. 1984), *rev'd*, 106 S. Ct. 1931 (1986).

56. *Id.* at 1133.

57. *Id.*

58. *Id.* at 1135.

59. *Id.*

60. *Philadelphia Gear*, 106 S. Ct. at 1933. Philadelphia Gear maintained that Penn Square Bank owed $724,728.50 on the standby letter of credit. Of that amount,

firmed "any and all" obligations under the letter of credit and returned the drafts unpaid, declaring that the letter of credit was not a "deposit."[61] Litigation ensued.

C. *The Federal District Court Decision*

This case was tried before Judge Lee T. West of the United States District Court for the Western District of Oklahoma.[62] Judge West found the deposits to be FDIC-insured and ordered the FDIC to pay Philadelphia Gear $100,000 in its capacity as insurer and $45,200 in its capacity as receiver. In response to post-trial motions, the court denied an award of attorney's fees to Philadelphia Gear.[63]

D. *The Tenth Circuit Decision*

On appeal, the FDIC advanced three arguments justifying its position that section 1813(*l*)(1) should not be interpreted to include standby letters of credit. First, a standby letter of credit fails to satisfy the definition of "deposit" that is contained in section 1813(*l*)(1) because it is not "money or its equivalent."[64] Since Philadelphia Gear could not present the letter of credit to Penn Square Bank unless Orion did not pay current invoices, this contingent letter of credit did not create the unconditional obligation which is the essential element of "money or its equivalent." Second, this standby letter of credit was not "money or its equivalent" because the promissory note that Orion gave to Penn Square Bank as a security was accompanied not by cash, but a mere promise to pay in the event the letter of credit was presented to the bank. Third, a standby letter of credit is not an obligation for which the bank is "primarily" liable, because standby letters of credit represent secondary liabilities.[65] The FDIC asserted that because it is charged with administering the provisions of the statute referring to letters of credit, and had always interpreted section 1813(*l*)(1) as excluding

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$100,000.00 was claimed to be federally insured, with $624,728.50 remaining as the uninsured outstanding balance. *Philadelphia Gear*, 751 F.2d at 1133.

61. *Id.* at 1134.

62. The actual case was not published in the Federal Supplement. What was published was the court's opinion in response to two post-trial motions. *Philadelphia Gear*, 587 F. Supp. at 297.

63. *Id.* at 302.

64. 12 U.S.C. § 1813(*l*)(1) (1982). This section of the Act defines a "deposit" as:

> The unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally . . . which is evidenced by . . . a letter of credit . . . on which the bank is primarily liable: *Provided*, that, without limiting the generality of the term 'money or its equivalent,' any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for . . . a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable. . . . (emphasis in original)

The Tenth Circuit also rejected the FDIC's contention that the note that Orion executed in favor of Penn Square Bank was not a "promissory note" within the meaning of U.C.C. § 3-104(1)(b) (1978), because it did not represent an unconditional promise to pay. *Philadelphia Gear*, 751 F.2d at 1134-35.

65. *Philadelphia Gear*, 751 F.2d at 1135.

standby letters of credit, its interpretation of the statute was entitled to substantial deference.[66]

The Tenth Circuit rejected all three arguments. Judge Logan wrote the opinion. While acknowledging that courts often accord deference to the interpretations that an administrative agency gives a federal statute,[67] the court also pointed out the circumstances under which such interpretations can be disregarded.[68] The court found no evidence that Congress had expressly delegated authority to the FDIC to refine the statutory definition of "deposit", and chose to disregard the FDIC's interpretation.

With regard to the FDIC's second argument, the court examined the difference between the promissory note that Orion gave to Penn Square Bank and the agreement between Orion and Philadelphia Gear creating the standby letter of credit. The court stated that the negotiability of an instrument such as a promissory note must be determined by examining the face of the document that Orion gave to Penn Square Bank without regard to extraneous documents.[69] The court found that the terms of the agreement between Orion and Philadelphia Gear were not contained in the agreement between Orion and Penn Square Bank. Therefore, concluded the court, no conditions restricting the negotiability of the letter of credit were present, and the letter of credit was found to be "money or its equivalent."[70]

The FDIC finally argued that the structure of section 1817[71] ex-

66. 12 U.S.C. § 1819 (1982). The definition of "deposit" found in section 1813(*l*)(1) is based upon the former Regulation I, Rule 1, Oct. 1, 1935, 12 C.F.R. § 301.1 (1939), *revoked after incorporation into statutory law*, 12 C.F.R. § 234 (Supp. 1962). That Congress incorporated the FDIC regulatory definition of "deposit" into the Federal Deposit Insurance Act amendments in 1960 lends credence to the validity of the FDIC interpretation. Pub. L. No. 86-671, 74 Stat. 546 (1960) (codified at 12 U.S.C. § 1813(*l*)(1) (1982)). In addition, although the FDIC issued no regulations excluding standby letters of credit from the regulatory definition of "deposit," there is some indication that FDIC officials in 1935 thought that they were excluded. One official, when asked whether a letter of credit was a deposit, stated:

> If your letter of credit is issued by a charge against the depositor's account or for cash and the letter of credit is reflected on your books as a liability, you do have a deposit liability. If, on the other hand, you merely extend a line of credit to your customer, you will only show a contingent liability on your books. In that event no deposit liability has been created.

FDIC v. Irving Trust Co., 137 F. Supp. 145, 161 (S.D.N.Y. 1955) (quoted in *Philadelphia Gear*, 106 S. Ct. at 1938); *see also* J. DOLAN, THE LAW OF LETTERS OF CREDIT 12.02(1)(a) at 12-2 to 4 (1984) ("[I]n the FDIC's view, the beneficiary of a standby credit does not have a provable claim.").

67. *See, e.g.*, Federal Election Commission v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) (judicial deference granted to interpretation of administrative agencies is often appropriate).

68. *Philadelphia Gear*, 751 F.2d at 1135. In deciding the degree of judicial deference to attach to an administrative interpretation, courts should consider the thoroughness of the agency's research, the validity of its reasoning, and how consistent such an interpretation is to prior and subsequent agency pronouncements. Adams Wrecking Co. v. United States, 434 U.S. 275, 284 n.5 (1978).

69. *Philadelphia Gear*, 751 F.2d at 1134; *see* U.C.C. § 3-105(2)(a) (1978) & Official Comments.

70. *Philadelphia Gear*, 751 F.2d at 1134-35.

71. 12 U.S.C. § 1817 (1982).

cludes standby letters from the scope of section 1813(*l*)(1)'s definitions of "deposit." Section 1817 establishes guidelines for determining the amount each member bank is assessed for insurance. Member banks are required to report to the FDIC their total deposit liabilities that would be "absolutely due and owing in the event of a bank failure."[72] Because standby letters of credit are contingent, they do not fall into the category of an absolute obligation that member banks are required to report. Therefore, maintained the FDIC, even though section 1817(4) refers to section 1813 for its definitions of "deposit," it could not include a standby letter of credit as a deposit upon which insurance rates are assessed. The court rejected this line of reasoning, finding no support in the language or legislative history of section 1817.[73]

The Tenth Circuit's decision upheld the judgment against the FDIC for $100,000 based on the FDIC's status as insurer, and for $45,200 based on the FDIC's status as receiver.[74] The decision also overruled an award of prejudgment interest, stating that the FDIC was immune to such judgments because of the doctrine of sovereign immunity.[75]

E. *The United States Supreme Court Decision*

1. Majority Opinion

Justice O'Connor's majority opinion stressed the history of banking regulation and insurance in this country. Her opinion referred to legislative history in order to assert that the purpose of the FDIC has been to protect the "assets and 'hard earnings' that businesses and individuals have entrusted to banks."[76] She stated that this purpose "is not furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the custody of the bank."[77]

The FDIC had argued that it provides insurance based only on the amount of deposits in a bank, and that the FDIC has not included in its computation of deposits the amount of standby letters of credit backed by contingent promissory notes.[78] Although this argument failed to persuade the Tenth Circuit, it found a more receptive audience in the Supreme Court.

Noting that in 1950 Congress had reenacted the provisions of the Banking Act of 1935 without alteration, the Court relied on the maxim of statutory construction that reenactment of a statute without change

72. *Philadelphia Gear*, 751 F.2d at 1137.
73. *Id.*
74. *Id.* at 1140.
75. *Id.* at 1138-39.
76. *Philadelphia Gear*, 106 S. Ct. at 1936. *See* S. REP. No. 1821, 86th Cong., 2d Sess., 7, 10 (1960), *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 3234.
77. *Philadelphia Gear*, 106 S. Ct. at 1936.
78. *Philadelphia Gear*, 751 F.2d at 1138. The FDIC also does not include standby letters of credit in its computation of the premiums it charges member banks. *Philadelphia Gear*, 106 S. Ct. at 1938. In 1985, standby letters of credit represented potential obligations of more than $137 billion. Wall St. J., Jan. 17, 1985, at 46, col. 4.

signals congressional approval of whatever interpretations its terms had received.[79] The Court acknowledged that the FDIC's interpretation of the statute defining "deposit" had never been reduced to a specific regulation. Nevertheless, the Court concluded that in the circumstances of this case the FDIC's "practice and belief" that a standby letter of credit backed by a contingent promissory note does not create a "deposit" within the meaning of the statute was entitled to the "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[80] Based on this, the Supreme Court reversed the decisions of the district court and the Tenth Circuit Court, holding that a standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit.

2. The Dissenting Opinion

The dissent, authored by Justice Marshall, acknowledged that there was considerable common sense backing the Court's opinion.[81] Nevertheless, Justice Marshall maintained that in order to reach its result, the majority had to read qualifications into the statute that did not appear there. In so doing, Justice Marshall claimed that the majority ignored settled principles of banking law and created distinctions that were supported neither by the plain meaning of the statute nor by its legislative history.[82] The dissent cited another Tenth Circuit case analyzed here, *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*,[83] for the proposition that "when the ingenuity of businessmen creates transactions and corporate forms that were perhaps not contemplated by Congress, the courts must enforce the statutes that Congress has enacted."[84] Accordingly, argued Justice Marshall, section 1813(*l*)(1) as written does not recognize the distinction between a commercial and a standby letter of credit. While such a distinction might be worthwhile,

79. *Philadelphia Gear*, 106 S. Ct. at 1937; *see* NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974).

80. *Philadelphia Gear*, 106 S. Ct. at 1938-39 (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). Unlike a standby letter of credit, a commercial letter of credit is without question a federally insured deposit. FDIC v. Irving Trust Co., 137 F. Supp. 145 (S.D.N.Y. 1955). A commercial letter of credit differs from a standby letter of credit in another important respect. Banks that issue commercial letters of credit expect that the beneficiary will present the letter to the bank no matter how smoothly the underlying transaction proceeds. *See* B. CLARK, *supra* note 53, ¶ 8.2, at 8-5. By contrast, banks that issue a standby letter of credit do not expect the beneficiary to present the letter to the bank for payment unless the party to whom the letter is issued is unable to pay. *See* J. WHITE & R. SUMMERS, *supra* note 53, at 713 (1980); Justice, *Letters of Credit: Expectations and Frustrations - Part I*, 94 BANKING L.J. 424, 430-31 (1977). In fact, only about 2% of all standby letters of credit are ever presented for payment. *See* Lloyd-Davies, *Survey of Standby Letters of Credit*, 65 FED. RESERVE BULL. 716, 717 (1979).

81. *Philadelphia Gear*, 106 S. Ct. at 1939 (Marshall, J., dissenting).

82. *Id.* (Marshall, J., dissenting). Even before the Federal Deposit Insurance Act was promulgated, it had long been recognized that a promissory note whose obligation to pay was contingent must appear so on the face of the note rather than by resort to extraneous documents. *See* J. THORNDIKE, STORY ON PROMISSORY NOTES 34 (7th ed. 1878).

83. 106 S. Ct. 681 (1986).

84. *Philadelphia Gear*, 106 S. Ct. at 1939 (Marshall, J., dissenting).

Justice Marshall concluded, it is up to Congress, not the FDIC or the Court, to make such a decision.[85] Therefore, the dissent would have affirmed the lower court's inclusion of standby letters of credit within the definition of section 1813(*l*)(1).

Justice Marshall also objected to the majority's characterization of the promissory note that Orion gave to Penn Square Bank as a "contingent" obligation that rendered it non-negotiable. He felt that no impediments to immediate enforceability appeared on the face of the note, and that the note therefore represented an unconditional promise to pay, which satisfied the requirements of full negotiability under the Uniform Commercial Code and Oklahoma law.[86] As an example, Justice Marshall observed that if the note that Orion gave to Penn Square Bank had somehow been assigned to another, then Orion would have been required to honor it.[87] Justice Marshall concluded that the majority lacked judicial restraint by interpreting section 1813(*l*)(1) not as it was written, but how the majority would like it to be.[88]

F. *Analysis and Conculsion*

The Supreme Court was faced with the thankless task of interpreting a legislative scheme that failed to anticipate its own ambiguity, much less offer guidance through legislative history. By deciding that standby letters of credit are not insurable deposits within the meaning of section 1813(*l*)(1), the Court succumbed to the temptation to make rather than interpret law. Professor Tribe has described this tendency as the Court's "persistent willingness to hear legal music in the sounds of silence."[89] In the process, it overruled a Tenth Circuit opinion that demonstrated good sense as well as commendable judicial restraint.

The Court acknowledged that the FDIC's interpretation of "deposit" is not expressed in any formal regulation, but nevertheless argued that Congress adopted its interpretation by reenacting the law without alteration in 1950.[90] The Court conceded that the document that Orion gave to Penn Square Bank not only bore a facial resemblance to, but also satisfied the Oklahoma statutory requirements of a promissory note. Even so, the Court concluded that the document cannot be considered a promissory note for purposes of federal insurance law because of its contingent nature.[91]

A literal reading of section 1813(*l*)(1) supports the contention of the Tenth Circuit that standby letters of credit, like commercial letters of credit, should be treated as federally insured deposits. Section 1813(*l*)(1) defines a "deposit" as:

85. *Id.* (Marshall, J., dissenting).
86. *Id.* at 1940 (Marshall, J., dissenting); *see* U.C.C. § 3-104(1) (1978); OKLA. STAT. tit. 12A, § 3-104(1) (1978).
87. *Philadelphia Gear*, 106 S. Ct. at 1941 (Marshall, J., dissenting).
88. *Id.* (Marshall, J., dissenting).
89. L. TRIBE, CONSTITUTIONAL CHOICES 30 (1985).
90. *Philadelphia Gear*, 106 S. Ct. at 1937.
91. *Id.* at 1934.

> [T]he unpaid balance of money or its equivalent received or held by a bank in the usual course of business and *for which it has given or is obligated to give credit, either conditionally or unconditionally . . . which is evidenced by . . . a letter of credit* . . . on which the bank is primarily liable: *Provided*, That, without limiting the generality of the term "money or its equivalent", any such . . . instrument must be regarded as evidencing the receipt of the equivalent of money *when issued in exchange . . . for a promissory note* upon which the person obtaining any such . . . instrument is primarily or secondarily liable.[92]

Therefore, since a standby letter of credit is by definition an obligation on the part of a bank which is conditional upon the inability of its customer to pay, it would appear that a standby letter of credit would rest within the ambit of section 1813(*l*)(1).[93] Although the Supreme Court properly recognized that the springboard of statutory construction is the language of the law in question, it chose to place greater weight upon the informal interpretation of the agency charged with enforcing the statute then upon a reading of the statute itself.[94] Because neither interpretation is inconsistent with the legislative purpose of protecting the earnings of depositors, the more constricted reading that the Supreme Court gave to section 1813(*l*)(1) seems uncalled for.

The dissenting trio was composed of Justices Marshall, Blackmun and Rehnquist. Although it may seem strange to see Justice Rehnquist joining such an alliance, he remains faithful to the strict constructionist philosophy — rule on the basis of what the law states, not on what he might like the law to be — which earned him recent appointment as Chief Justice. As the dissent noted, Philadelphia Gear's status as an insured depositor depends upon the terms of the underlying repayment agreement between Orion Manufacturing and Penn Square Bank. Ordinarily, the beneficiary of a letter of credit would pay no attention to the terms of the agreement between the issuing bank and its customer because the nature of letters of credit are such that issuing banks merely examine the face of the letter when it is presented.[95] However, with this

92. 12 U.S.C. § 1813(*l*)(1) (1982) (emphasis added).

93. *See, e.g.*, Regulation H of the Board of Governors of the Federal Reserve System, which defines a standby letter of credit as one "which represents an obligation to the beneficiary on the part of the issuer . . . (3) to make payment on account of any default by the account party in the performance of an obligation." 12 C.F.R. § 208.8(d)(1) (1977). One observer has analyzed this passage of section 1813(*l*)(1) and come to the conclusion that the phrase "conditionally or unconditionally" does not modify the words "is obligated to give credit;" instead, maintains the writer, it refers to the presence or absence of a requirement that the beneficiary of a letter of credit present certain documents when demanding payment. As such, it would not include standby letters of credit in the definition of "deposit." *See* Note, *supra* note 53, at 1182. While this argument has some merit, it presumes that Congress intended to use the phrase "is obligated to give credit, conditionally or unconditionally" in a technical sense rather than deriving its meaning from the words in their ordinary usage. In the absence of an indication to the contrary in the legislative history of section 1813(*l*)(1), it makes more intuitive sense to adopt the straightforward construction given to the statute by the Tenth Circuit. *See Philadelphia Gear*, 751 F.2d at 1137.

94. *Philadelphia Gear*, 106 S. Ct. at 1938-39.

95. *Philadelphia Gear*, 106 S. Ct. at 1937-38.

opinion, the Supreme Court has recognized a distinction between commercial and standby letters of credit for purposes of federal deposit insurance coverage.[96] Companies and their lawyers need to note this, and to adjust accordingly so that they will not find themselves in Philadelphia Gear's predicament.[97]

III. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*: The Supreme Court Sets Aside a Federal Reserve Board Rule Regulating "Nonbank" Financial Institutions as Banks

A. *Introduction*

The Federal Reserve Board has regulatory authority over any company controlling an institution that is defined as a "bank" by the Bank Holding Company Act of 1956.[98] This holding company regulation is in addition to the regulations imposed on banks themselves.[99] By taking advantage of a definitional loophole in the statute, many financial institutions had successfully placed themselves outside of the narrow definition of a "bank" so that their holding companies could escape the onerous regulations of the Federal Reserve Board.[100] In an effort to reduce the competitive advantages enjoyed by those institutions outside the purview of the Bank Holding Company Act,[101] the Federal Reserve Board promulgated rules that expanded the definition of a "bank" to

96. *See* U.C.C. § 5-114(1) (1978) & Official Comment 1. Justice Marshall found it anomalous to require reference to the terms of the agreement between the bank and its customer in order to determine the insurability of a letter of credit, because frequently the beneficiary neither knows nor cares what those terms are. *Philadelphia Gear*, 106 S. Ct. at 1941 n.2 (Marshall, J., dissenting).

97. *Philadelphia Gear*, 106 S. Ct. at 1940-41 (Marshall, J., dissenting).

98. Bank Holding Company Act of 1956, 12 U.S.C. § 1841(a)(1) (1982) (defining bank holding company); 12 U.S.C. § 1841(c) (1982) (defining banks).

99. Although nonbank institutions are treated as banks for purposes of most of the Title 12 provisions of the United States Code, their holding companies can successfully dodge the second layer of regulation that is imposed on bank holding companies if the institution they control does not meet the narrow statutory definition of a "bank" that is found in section 1841(c) of Title 12. Note, *The Demise of the Bank-Nonbank distinction: An Argument for Deregulating the Activities of Bank Holding Companies*, 98 HARV. L. REV. 650, 653-54 (1985).

100. 12 U.S.C. § 1841(c) (1982), as amended, defines a "bank" as any institution which "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." If a "bank" does not meet both parts of the definitional test, its holding company will not be subject to the Act. *Id.*

101. Under the Bank Holding Company Act, bank holding companies are subject to stringent application requirements to acquire a bank, *see* 12 U.S.C. § 1842(a)-(c) (1982); extensive financial reporting requirements, *see* 12 U.S.C. § 1844(a) and (c) (1982); examination and supervision by the Federal Reserve Board, *see* 12 U.S.C. § 1844(e)(1) (1982); minimum capital requirement at the holding company level, *see* 12 C.F.R. § 225 (1984); and requirements that they engage in only a narrow range of nonbanking activities deemed by the Federal Reserve Board to be closely related to banking and which must reasonably be expected to produce benefits to the public, *see* 12 U.S.C. § 1843(c)(8) (1982).

include many of these "nonbank" financial institutions.[102] In *Dimension Financial Corp. v. Board of Governors of the Federal Reserve System*,[103] the Tenth Circuit invalidated the Board's attempt to regulate these nonbank financial institutions.[104] The Supreme Court's affirmation[105] of this Tenth Circuit decision will allow nonbank financial institutions to continue their growth into traditional banking areas.

B. *Facts*

The Bank Holding Company Act of 1956[106] was passed "to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit."[107] The definition of a bank depended on the bank's charter under the original Act.[108] Since the Act's passage, the definition of a bank has been narrowed. In 1966, the charter test was eliminated, and a "bank" was redefined as an institution which accepts deposits which the depositor has a legal right to withdraw on demand.[109] In 1970, the definition was further restricted by requiring that the institution must also be engaged in the business of making commercial loans.[110]

The Federal Reserve Board was concerned that certain unregulated nonbank financial institutions were enjoying a competitive advantage over those institutions regulated as bank holding companies as a result of these definitional restrictions.[111] In an attempt to protect bank holding companies from the unfair advantages enjoyed by such nonbank banks, the Board redefined the demand and commercial loan components of the statutory provision.[112] The intent of this administrative action was to regulate nonbank financial institutions, such as Dimension Financial Corporation, that were offering the functional equivalent of traditional banking services.[113]

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102. Revision of Regulation Y, 12 C.F.R. § 225 (1984) provides that the Board's broad interpretation of the statutory definition of a "bank" include

> any institution that accepts deposits that *as a matter of practice* are payable on demand, and that engages in the business of making any loan other than a loan to an individual for personal, family, household, or charitable purposes, including the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments. (emphasis added).

103. 744 F.2d 1402 (10th Cir. 1984), *aff'd*, 106 S. Ct. 681 (1986).

104. *Id.* at 1411.

105. Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 106 S. Ct. 681 (1986).

106. Bank Holding Company Act of 1956, Pub. L. No. 511, 70 Stat. 133 (1956).

107. S. REP. No. 91-1084, 91st Cong., 2d Sess., 24 *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5519, 5541.

108. Bank Holding Company Act of 1956, Pub. L. No. 511 (1956).

109. Pub. L. No. 89-484, 80 Stat. 235 (1966).

110. Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, 84 Stat. 1760 (1970).

111. Revision of Regulation Y, 12 C.F.R. § 225 (1984).

112. 12 C.F.R. § 225.2(a)(1)(A)-(B) (1985).

113. The types of nonbank financial institutions that the Board was concerned with included those that offered NOW (negotiable order of withdrawal) accounts that do not give the depositor a legal right to withdraw on demand. In addition, the Board was con-

C. *The Tenth Circuit Opinion*

The Tenth Circuit invalidated the Federal Reserve Board's attempted regulation of nonbank financial institutions on the ground that the Board's broad interpretation of the statutory definition of a bank exceeded the Board's rulemaking authority.[114] While acknowledging that the Board has authority under the Act to make rules and regulations,[115] the court stated that this authority is limited to the degree "necessary to enable it to administer and carry out the purposes of [the statute] and prevent evasions thereof."[116] The court stated that the deference usually accorded regulatory agencies is based on the assumption that the regulatory action has been taken to "carry out the particular purpose of the statute and not to meet other conditions, related or not, that the *agency decides* should be changed or regulated."[117] The court found that the Board's new definition of a bank "had nothing to do with the original meaning of the term nor the then current meaning, but instead was a device to accomplish an end — a change in the Board's jurisdiction."[118] Since the conditions for permissive regulatory action were not met, the Board's attempt to implement and enforce the changes in the regulations were held invalid.[119]

With regard to the demand deposit element of the statutory definition, the court, relying on its earlier decision in *First Bankcorporation v. Board of Governors*,[120] held that accounts which are subject to withdrawal upon demand as a practical matter, but not as a right, were not included in that definition.[121] The court stated that the demand deposit element of the definition was clearly settled in *First Bankcorporation*, wherein it was held that an institution which retains a technical prior notice requirement before withdrawal of funds, does not, for the purposes of the statutory definition of a bank, accept deposits that the depositor has a legal right to withdraw on demand.[122] The court more carefully analyzed the commercial loan element of the statutory definition, and held that the inclusion of money market transactions within the term "commercial loans" was not supported by the purpose or legislative history of the Bank Holding Company Act, nor was the new definition of a "bank" in accord with common usage of the term in the financial community.[123]

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cerned with those institutions that were involved in money market transactions. *Dimension Financial Corp.*, 106 S. Ct. at 683.

114. Dimension Financial Corp. v. Board of Governors of the Federal Reserve System, 744 F.2d 1402, 1410, 1411 (10th Cir. 1984).

115. *See* 12 U.S.C. § 1844(b) (1982).

116. *Dimension Financial Corp.*, 744 F.2d at 1408.

117. *Id.* at 1410 (emphasis added).

118. *Id.* at 1405.

119. *Id.* at 1411.

120. 728 F.2d 434 (10th Cir. 1984).

121. *Id.* at 436, 437.

122. *Dimension Financial Corp.*, 744 F.2d at 1404.

123. *Id.* at 1406.

D. *The United States Supreme Court Opinion*

The Supreme Court granted certiorari to decide whether the Federal Reserve Board acted within its rulemaking authority in redefining banks under the Bank Holding Company Act.[124] The Court did not limit its review to analyzing the commercial loan element of the definition developed by the Tenth Circuit. Rather, its detailed analysis extended to the demand deposit element previously developed by the Tenth Circuit in *First Bankcorporation*,[125] and summarily relied upon by the Tenth Circuit's decision below.

In affirming the Tenth Circuit's decision, the Court accepted the Circuit's rulings on both elements of the definition.[126] The Court held that the Board had not acted within its rulemaking authority in defining banks subject to regulation under the Bank Holding Company Act, and that the Board's interpretation of the statutory definition could not be supported on the asserted basis that it fell within the Act's plain purpose of regulating institutions functionally equivalent to banks.[127]

With regard to the demand deposit element of the definition of a bank, the Court stated that judicial deference to agency interpretation of a rule should not be applied in contravention of Congress' express intent. The Court continued:

> No amount of agency expertise - however sound may be the result - can make the words "legal right" mean a right to do something "as a matter of practice." A legal right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. . . . The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).[128]

With regard to the commercial loan element of the definition of a bank, the Court stated that "money market transactions do not fall within the commonly accepted definition of commercial loans."[129] After a review of the legislative history of the statute and of the Board's prior position on the definition of a commercial loan, the Court found nothing to indicate that Congress meant to use the term "commercial loan" in anything but its accepted usage, and held that the Board's definition was "not a reasonable interpretation of § 2(c)."[130]

The Court concluded by stating that, while regulation of nonbank banks might be a desirable end, the Act's failure to protect public interests is "a problem for Congress, and not the Board or the courts, to address."[131]

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124. Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 106 S. Ct. 681, 683 (1986).
125. 728 F.2d 434 (10th Cir. 1984).
126. *Dimension Financial Corp.*, 106 S. Ct. at 684.
127. *Id.* at 684, 688, 689.
128. *Id.* at 686.
129. *Id.*
130. *Id.* at 688.
131. *Id.* at 689.

E. *Conclusion*

In this decision, the Supreme Court affirmed the Tenth Circuit's invalidation of an attempt by the Federal Reserve Board to regulate nonbank financial institutions. Although the opinion focused more on the rulemaking authority of regulatory agencies than on the banking industry itself, the effect on banking will be significant nonetheless. The Court's decision will obviously curtail the Board's ability to eliminate the competitive advantages presently enjoyed by nonbank banks that are free from activities regulation. Accordingly, it could be expected that the continued growth of nonbank banks into traditional banking areas will cause increased concern on the part of many banks and regulatory agencies, leading to a call for legislative reform.[132] Since congressional action alone can resolve these issues, perhaps the time has come for legislators to review the matter with an eye towards developing a satisfactory resolution. Unless Congress does act in this manner, however, we can expect to see continued rapid change in the structure of financial institutions and the services they provide.

*Bill Van Horn**

IV. *Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana*: The Supreme Court Holds that Pueblo Indians May Alienate Their Lands Without Congressional Approval

A. *Introduction*

Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana[133] involved the validity of a telephone and telegraph easement purchased in 1928 by Mountain States Telephone and Telegraph Company (Mountain Bell) from the Pueblo of Santa Ana, in New Mexico. The dispute centered on apparently conflicting provisions of two statutes. The first statute, the Nonintercourse Act of 1834,[134] generally requires a treaty or convention, and thus congressional approval, to validly alienate Indian lands. The second statute, the Pueblo Lands Act of 1924[135] contains language which had been interpreted by the Secretary of the Interior as allowing the Secretary the authority to approve

132. *See generally*, Note, *The Demise of the Bank-Nonbank Distinction: An Argument for Deregulating the Activities of Bank Holding Companies*, 98 HARV. L. REV. 650 (1985); Note, *Product Expansion in the Banking Industry: An Analysis and Revision of § 4(c)(8) of the Bank Holding Company Act*, 53 FORDHAM L. REV. 1127 (1985); Note, *Avoiding the Glass-Steagall and Bank Holding Company Acts: An Option for Bank Product Expansion*, 59 IND. L.J. 89 (1984); Note, *Restrictions on Bank Underwriting of Corporate Securities: A Proposal for More Permissive Regulation*, 97 HARV. L. REV. 720 (1984).

* The author gratefully acknowledges the writing and editing assistance of Victoria Parks on *Aspen Skiing*, Edward J. Posselius III on *Philadelphia Gear*, and Vincent Oliva on *Dimension Financial*.

133. 105 S. Ct. 2587 (1985).

134. 25 U.S.C. § 177 (1982).

135. Ch. 331, 43 Stat. 636 (1924).

alienation of Pueblo lands without congressional approval. This case involved an alienation approved by the Secretary but not by Congress.

The Pueblo argued that the Nonintercourse Act applied and that the language of the Pueblo Lands Act did not extinguish the necessity of congressional approval to alienate Pueblo lands. Mountain Bell contended that the Pueblo Lands Act allowed the Secretary of the Interior, without the approval of Congress, to approve alienation of Pueblo lands. The Supreme Court agreed with Mountain Bell and found the easement valid. In so doing, it interpreted the Pueblo Lands Act under normal canons of statutory construction rather than the accepted canons of Indian law construction that had been applied by the district court and considered by the Tenth Circuit in ruling for the Pueblo.

B. *Facts*

The subject of the suit was a telephone and telegraph line which was constructed on a right of way acquired in 1905 by a predecessor to Mountain Bell. In 1927, the government, on behalf of the Pueblo, brought a quiet title action to challenge the validity of the easement.[136] The litigation was settled in 1928 when Mountain Bell purchased the easement from the Pueblo. The transaction was approved by the Secretary of the Interior, and the company was dismissed from the suit. The poles and lines were removed in 1980 and the easement was relinquished. Shortly thereafter the Pueblo again brought suit; this time a trespass action against Mountain Bell, seeking compensation for the time that the poles had been in place.[137]

C. *Legal Background*

The dispute involved two apparently contradictory statutes, the first being the Nonintercourse Act of 1834 which states: "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."[138] The second statute, the Pueblo Lands Act of 1924, was enacted by Congress to provide for the final adjudication and recognition of approximately 3,000 land titles, ac-

136. The United States has historically initiated litigation on behalf of Indians as part of its trust and guardianship responsibilities. F. COHEN, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 308-11 (1982).

137. *Pueblo of Santa Ana*, 105 S. Ct. at 2593-94 (1985). During the times the poles were in place, they were used, at least in part, to serve the Pueblo. At the time the suit was brought, the Indians did not know that the poles had been removed. Had they known, the suit might not have been brought. Mountain Bell's potential financial liability, in any case, was small in comparison to that of the Atchinson, Topeka & Santa Fe Railway Company, which took an active interest in the litigation. Personal communication with K.M. Krause (Jan. 17, 1987). The Secretary of the Interior may generally grant rights-of-way for telephone and telegraph lines. 25 U.S.C. § 319 (1982), 25 C.F.R. § 169 (1983). These provisions were not applicable to the easement in question.

138. 25 U.S.C. § 177 (1982). *See generally* F. COHEN, *supra* note 136, at 510-22 (discussing Nonintercourse Act applications and exceptions).

quired from Pueblo Indians by non-Indians, outside the provisions of the Nonintercourse Act.[139] The Act also provided for consolidation of Pueblo lands. The first sixteen sections of the Pueblo Lands Act remedied past actions. Section 17 provided a confusing prescription for future land alienation.[140]

D. *The District Court Opinion*

In a short unpublished opinion,[141] Judge Edwin L. Mecham of the United States District Court for the District of New Mexico held the easement void and found Mountain Bell liable for trespass. The court found the statutory language controlling the case to be unclear and applied accepted canons of Indian law construction which require that statutory ambiguities be resolved in favor of the Indians.[142] The court also found that the previous litigation had no *res judicata* or collateral estoppel effect.[143] Interlocutory appeal of the liability finding was certified.

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139. The settlers acquiring the land from the Pueblos relied on the Supreme Court's ruling in United States v. Joseph, 94 U.S. 614 (1877), that the Pueblo Indians were not an "Indian tribe" within the meaning of the Nonintercourse Act and could freely alienate their lands. The subsequent decision in United States v. Sandoval, 231 U.S. 28 (1913), disapproved *Joseph's* distinction of the Pueblo Indians under the Nonintercourse Act and applied liquor laws to the Pueblos. The disapproval of *Joseph* placed the titles acquired from the Pueblo Indians in reliance on *Joseph* in doubt. This was at least part of the incentive for passage of the Pueblo Lands Act. *Pueblo of Santa Ana*, 105 S. Ct. at 1591-2.

140. The section reads:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may *hereafter be provided by Congress, and* no sale, grant, lease of any character, or other conveyance of lands, or any title or claims thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first *approved by the Secretary of the Interior.*

Ch. 331, 43 Stat. 641 (1924) (emphasis added).

141. Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co., No. 80-841 (D. N.M. June 2, 1982). The district court's opinion is reproduced in the Joint Appendix to the Petition for Certiorari of Mountain States Telephone and Telegraph Company 85-94 (hereinafter cited as Joint Appendix).

142. Joint Appendix, *supra* note 141, at 90, 92. *See infra* note 161 and accompanying text. Professor Cohen points out that:

> The rules for construing federal statutes in Indian affairs have a pervasive influence in Indian law. The canons are variously phrased in different contexts, but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. These canons play an essential role in implementing the trust relationship between the United States and Indian tribes and are involved in most of the subject matter of Indian law.

F. COHEN, *supra* note 136, at 224-25 (discussing canons of construction). Numerous Supreme Court cases have used the canons to resolve cases in favor of Indians. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (cited in Pueblo of Santa Ana v. Mountain States Telephone & Telegraph Co., 734 F.2d 1402 (10th Cir. 1984), by the Court of Appeals in resolving statutory ambiguities in favor of the Indians); United States ex rel. Haulpai Indians v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941) (cited by the Supreme Court dissent in *Pueblo of Santa Ana*, 105 S. Ct. at 2609, for proposition that alienation of Indian property is not to be "lightly implied" (quoting *ex rel. Haulpai Indians*, 314 U.S. at 354)). *See generally*, Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"-How Long a Time is That?*, 63 CALIF. L. REV. 601, 634-45 (1975).

143. Joint Appendix, *supra*, note 141, at 92.

E. *The Tenth Circuit Opinion*

The Tenth Circuit Court of Appeals allowed Mountain Bell's appeal and upheld the decision of the district court in all respects.[144] Judge Breitenstein[145] traced much of the history of the Pueblo Indians as well as court decisions concerning the tribe. He noted that the Tenth Circuit had previously applied the Nonintercourse Act to the Pueblos three times.[146] In holding that it applied in this case, he noted that while the legislative history of section 17 was ambiguous, the mandate of congressional approval for alienation of Pueblo lands was not ambiguous. He further reasoned that even if there was some ambiguity, the accepted canon of Indian law that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians. . . ." would mandate resolution in favor of the Pueblo.[147] Prior administrative interpretation of section 17 and any *res judicata* effect of the prior suit were unpersuasive in the face of what the court perceived as the clear mandate of section 17 for secretarial *and* congressional approval of any alienation of Pueblo lands.[148]

F. *The United States Supreme Court Decision*

1. The Majority Opinion

In a 5 to 3 decision, the Supreme Court reversed the district court and the Tenth Circuit Court of Appeals. The Court, in an opinion authored by Justice Stevens,[149] held that the Nonintercourse Act of 1834 does not apply to the Pueblo Indians of New Mexico, thereby allowing them to alienate their lands without congressional approval.[150] Like the Tenth Circuit, the Court traced the history leading up to the passage of the Pueblo Lands Act. They also described the title clearing actions that occurred as a result of the Act, including the 1927 suit challenging the

144. Pueblo of Santa Ana v. Mountain States Telephone & Telegraph Co, 734 F.2d 1402 (10th Cir. 1984).

145. Other members of the panel included Judge McWilliams and Judge Logan.

146. *Pueblo of Santa Ana*, 734 F.2d at 1404-05. In the previous applications of the Nonintercourse Act to the Pueblos, as here, the Tenth Circuit had interpreted United States v. Sandoval as specifically overruling United States v. Joseph and generally applying the Nonintercourse Act to the Pueblos. In the present case, the Supreme Court described the holding of *Sandoval* as restricted to the application of liquor laws, alienation issues being addressed only by implication. *Pueblo of Santa Ana*, 105 S. Ct. at 2596; *see supra* note 138.

147. *Pueblo of Santa Ana*, 734 F.2d at 1406-07 (quoting Bryan v. Itasca County, 426 U.S. 373, 392 (1976)); *see supra* note 142.

148. *Pueblo of Santa Ana*, 734 F.2d at 1406-07. The arguments of *res judicata* and estoppel were, in part, rejected because the previous dismissal of Mountain Bell was not by formal court action, but rather by letter. In fact, the suit involving the easement was only one of many property interests that were being adjudicated as a result of the Pueblo Lands Act. *See supra* note 138 and accompanying text. Apparently the letter was only a matter of convenience and it was assumed that other more formally treated cases to which Mountain Bell was a party would provide adequate documentation of the procedures involved. Personal communication with K.M. Krause (Jan. 17, 1987).

149. Justice Stevens was joined by Justice Rehnquist, Chief Justice Burger, Justice O'Connor, and Justice White in the majority. Justice Powell took no part in the decision.

150. *Pueblo of Santa Ana*, 105 S. Ct. at 2598.

easement.[151] The Court apparently found neither the plain language of section 17 nor its legislative history clearly determinative of congressional intent. Instead, resolution rested on a choice between two statutory construction arguments.[152]

First, the majority reasoned that an interpretation of section 17 requiring congressional approval to alienate Pueblo lands would nullify the effect of section 16. The intent of section 16 was to provide a relatively expeditious method of consolidating Pueblo holdings by selling some holdings and buying others. To facilitate this, the terms of section 16 required only secretarial approval of these transactions. The Court felt that if section 17 generally required congressional approval for alienation, it would also require such approval for transactions under section 16 and, consequently, impede its expeditious purpose. Accordingly, the canon that "a statute should be interpreted so as not to render one part inoperative" applied to eliminate the congressional approval requirement.[153] There was no discussion, however, of canons that might dictate a different result, for example, that section 16 might be a specific provision overriding the more general mandate of section 17.[154]

The second, and more important statutory construction rationale applied was that "[t]he uniform and contemporaneous view of the Executive Officer responsible for administering the statute and the district court with exclusive jurisdiction over the quiet title actions brought under the Pueblo Lands Act 'is entitled to very great respect.' "[155] The Court seemed particularly deferential to the interpretation given the Pueblo Lands Act by agencies and courts immediately after its passage when the main title clearing provisions of the Act were being executed. The Court said that judges considering such matters fifty years later, should defer to this interpretation.[156]

2. The Dissenting Opinion

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. The dissent parallels the structure of the Tenth Circuit and majority opinions by tracing the history of the Pueblo Lands Act and its subsequent application.[157] The dissent made a credible case that the statutory structure and legislative history could support application of the Nonintercourse Act's requirement of congressional approval and

151. *Id.* at 2590-95.

152. The Court nowhere directly stated that the statutory language is ambiguous, but hints at ambiguity when it states that two "constructions find some support in the language of § 17." *Id.* at 1590. In any case, a discussion of statutory construction is not generally applied where there is no authority. *See* SINGER, SUTHERLAND STAT. CONST. § 45.02 (4th ed. 1984).

153. *Pueblo of Santa Ana*, 105 S. Ct. at 2595-96.

154. *See, e.g.*, D. Ginsberg Sons v. Popkin, 285 U.S. 204, 208 (1932).

155. *Pueblo of Santa Ana*, 105 S. Ct. at 2597 (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

156. *Id.* at 2597-98.

157. *Id.* at 2599-2602 (Brennan, J., dissenting).

that past administrative construction was not very consistent.[158]

The most notable difference is the application of the canons of Indian law construction which would normally restrict alienation of Indian lands and favor Indians where ambiguities clouded statutory interpretation.[159] It was in these areas that the dissent particularly disagreed with the majority's legal analysis. In spite of the rationalizations of statutory consistency and deference to administrative interpretation used by the majority, the dissent argued that, recognizing the ambiguity in section 17, the majority should have used the accepted Indian law canons to come to a different conclusion.[160]

G. *Analysis and Conclusion*

Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana represents one more in a series of recent Supreme Court decisions rejecting use of the canons of Indian law construction on behalf of tribes in their attempts to gain commercial or monetary advantage over parties other than the federal government.[161] Though neither the Supreme Court opinion nor the lower courts discussed the equity of having the utility pay for an easement for the third time, this could not have been totally ignored in the deliberations of the Justices.[162] It seems clear from both majority and dissenting opinions that the peculiarities of Indian law were not given great weight by the Supreme Court decision.[163]

On the other hand, the Court did not totally abandon the special protections accorded Indians by outwardly applying concepts of law normally applicable in a commercial situation.[164] The analysis relied totally on interpretation of the statutes involved, not on concepts of the parties' intent or estoppel that might have come into play in a commercial contract litigation. The dealings of Indians, especially in matters

158. *Id.* at 2602-08 (Brennan, J., dissenting).

159. *See supra* note 142.

160. *Pueblo of Santa Ana*, 105 S. Ct. at 2598-99 (Brennan, J., dissenting).

161. *See, e.g.*, United States v. Dion, 106 S. Ct. 2217, 2220 (1986) (allowing abrogation of treaty rights based on implication from legislative history); South Carolina v. Catawba Indian Tribe, 106 S. Ct. 2039 (1986) (The Tribe argued that application of the Nonintercourse Act voided titles of non-Indians who had purchased land from the Tribe, thus they could claim a 225 square mile area. The argument was defeated by application of a statutory construction that did not apply the Indian law canons. General statutory construction applied in *Pueblo of Santa Ana* was cited. The circuit court decision, which was favorable to the Tribe, was described in Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 105 S. Ct. 3420, 3432 (1985) (discussing Indian law canons, but deciding that their use was precluded by "fair appraisal" of other statutory construction aids); United States v. Dann, 470 U.S. 39 (1985) (using reference to common law in construing the word "payment" rather than Indian law canons); Note, *Tribal Property: Defending the Parameters of the Federal Trust Relationship under the Non-Intercourse Act,* Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983), 12 AM. INDIAN L. REV. 101 (1985). The favorable impact of Indian law canons on the circuit court decision that was reversed is mentioned in Foot, United States v. Dann: *What it Portends for Ownership of Millions of Acres in the Western United States*, 5 PUB. LAND L. REV. 183 (1984).

162. The question of triple payment was raised from the bench during oral argument before the Supreme Court. Personal communication with K.M. Krause (Jan. 17, 1987).

163. *Pueblo of Santa Ana*, 105 S. Ct. at 2598-99 (Brennan, J., dissenting).

164. *See* F. COHEN, *supra* note 136, at 650-51 (discussing Federal wardship of Indians).

concerning Indian lands, still seem to be very much a creature of federal statute.

The applicability of more general statutory construction practice in Indian cases is still very much in question. For example, the Tenth Circuit, in *Jicarilla Apache Tribe v. Supron Energy Corp.*,[165] used Indian law canons in holding that a tribe could force a federal agency to abandon its longstanding interpretation and apply a more favorable royalty calculation method for natural gas produced on a reservation.[166] The Supreme Court's opinion in *Pueblo of Santa Ana* was advanced as a reason for reversal of the Tenth Circuit decision both on rehearing and in a petition for *certiorari* to the Supreme Court.[167] In neither case was it persuasive.

Perhaps, as the dissent argues, this case should be restricted to those few situations falling under the Pueblo Lands Act, for there is nothing in the majority opinion specifying broader application. Nevertheless, it is hard to believe that Indians are not going to become more and more sophisticated and more incorporated into the commercial and economic life of society at large. When assimilation is complete, it seems inconceivable that courts will alter basic precepts of law, such as canons of statutory construction, so as to grant Indians commercial advantage. Perhaps *Pueblo of Santa Ana* is one small step towards the recognition of Indian equality in commercial dealings and before the courts.[168]

Eric Twelker

165. 782 F.2d 855 (10th Cir.) (en banc), *rev'g* 728 F.2d 1555 (1984), *cert. denied*, 107 S. Ct. 471 (1986).

166. 782 F.2d 855 (10th Cir. 1986) (en banc) (per curiam decision adopting the dissenting opinion of Justice Seymour in *Jicarilla Apache Tribe*, 728 F.2d at 1555 (1986)).

167. *See* Petition for Writ of Certiorari, Southland Royalty Co. v. Jicarilla Apache Tribe, *cert. denied*, 107 S. Ct. 471 (1986).

168. Justice Brennan, in his dissent, noted that "[c]haracteristically, it is non-Indian entities such as Petitioner and *amici* who argue for 'emancipation' of the Pueblos." *Pueblo of Santa Ana*, 105 S. Ct. at 2610-11 (quoting Brief for Respondant Pueblo). There is some indication that Indian arguments for more rights in some situations and less rights in others will not continue to receive unquestioning acceptance from the courts. Justice Marshall, in questioning from the bench during oral argument asked, in a tone expressing incredulity, if counsel for the Pueblo was really asking for restraints on alienation of Pueblo property. Personal communication with K.M. Krause (Jan. 17, 1987).